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NEWSLETTER

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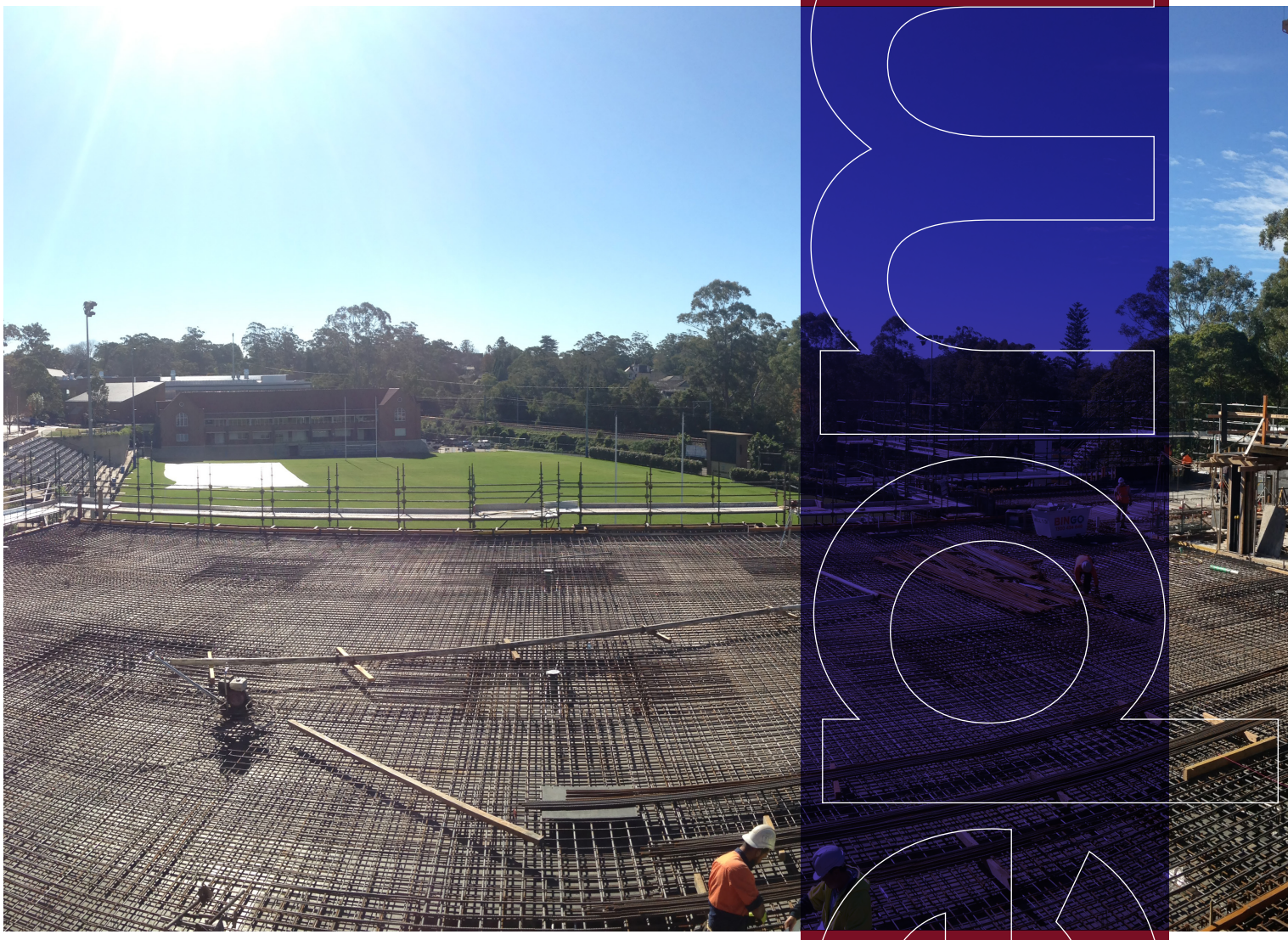

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green building council australia
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IS YOUR RESTRICTIVE COVENANT ENFORCEABLE?

Lawyers | McCullough Robertson

In New South Wales, it is a common occurrence to find restrictive covenants registered on land titles. Whilst it is often concerning to discover that there is a restriction on your use or development of land, the good news is that in many cases the restrictions are unenforceable and will have no practical effect.

A restrictive covenant is an agreement between owners of land which restricts use of a parcel of land (the burdened land) for the benefit of other land (the benefited land) and is registered on the title of the burdened land. Restrictive covenants are often used as a method of "controlling" how land is used and developed. Common examples of the restrictions imposed by restrictive covenants include restrictions as to the colour of buildings, type of building materials, the value of structures, the height, location or number of buildings and the use of buildings.

Whereas most agreements only legally bind the parties to the agreement, restrictive covenants in the proper form which are registered on title, are said to "run with the land". This means that successive owners of burdened and benefitted land are bound by the covenant unless it is unenforceable under the law.

For a restrictive covenant to be valid and enforceable, it must meet a number of requirements including clearly identifying the land which is benefitted and burdened and state that the covenant intends to bind successors in title.

A restrictive covenant may also be unenforceable in many other circumstances, including where the covenant does not contain an actual prohibition, where the benefitted land has been subsequently subdivided and where the covenant is personal or has no further practical value or application.

The Registrar General may also extinguish a restrictive covenant where it is "obsolete" for example, a building materials covenant, fencing covenant or value of structures covenant that is over 12 years old.

In the case of a development application, a restrictive covenant may be overridden if the local Council has adopted the overriding clause in their local environmental plan (or equivalent) pursuant to section 28 of the Environmental Planning and Assessment Act 1979.

It is important to note that if a covenant is breached, any person with the benefit of the covenant could take action against you seeking to prevent or remedy the breach of the covenant and claim damages arising from the breach. Therefore, very careful attention needs to be applied to any covenant when buying or developing land and advice should be sought as to whether your restrictive covenant is enforceable.

Samantha Daly
Partner

Danielle Le Breton
Senior Associate

DISPUTE RESOLUTION CLAUSES IN CONSTRUCTION CONTRACTS

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Legal advice in black and white

Dispute resolution clauses are often ignored in contracts, even when there's a dispute. Usually relegated to an agreement's back pages, they get little attention until things really start to go wrong. There are two times in the life of a contract when you should look at your dispute resolution clause – in the beginning before you sign and if you think a dispute is on the horizon.

Before You Sign

Before you sign an agreement, check to see if your contract has a dispute resolution clause. If it doesn't, consider proposing one. If it does, you will need to turn your mind to the requirements of the clause to see if it suits your needs and the needs of the project.

Dispute resolution clauses will generally:

1 set out a series of steps that the parties will need to undertake in the event of a dispute. This normally involves the service of certain notices setting out the nature of the dispute followed by a prescribed forum for dispute discussions; and

2 prescribe meetings, mediations, arbitration, expert determination or court for the resolution of the dispute. Meetings and mediations are the least formal of the dispute resolution procedures. They are usually prescribed as a first step to bring the parties to a dispute together in an attempt to resolve problems early. If that fails, a more formal approach will be prescribed. That formal procedure can come in the form of arbitration (a private tribunal process), expert determination (a process by which an expert third-party is asked to settle disputes) or litigation.

Most dispute resolution methods involve some cost. In a mediation, the parties will need to pay the costs of their mediator. In arbitration and expert determination, in addition to the costs of the decision maker (whether that's an arbitrator or an expert) there will usually be some legal and/or expert witness costs. For this reason, it is important to make an informed choice before you sign up.

After you sign

If you sense a project dispute on the horizon, remember that you will need to follow the procedure set out in the contract, as far as it is possible to do so. Consequences vary for parties that abandon or refuse to follow an agreed protocol. Comprehensive dispute resolution clauses will usually state that if a party abandons the prescribed process, the innocent party will be free to litigate their dispute.

Dispute resolution clauses can assist parties to resolve their problems in a structured way. If you have any questions about a dispute resolution clause, speak to your legal advisor. They can help you determine if the proposed procedure is right for you.

Helena Golovanoff

Partner

AN INDEPENDENT VIEW

The role of a Quantity Surveyor can be varied, and at times, include being engaged as an Independent Arbitrator when disputes arise

Occasionally Quantity Surveyors may be requested to mediate over a construction industry dispute. In most instances the dispute would be over cost or quantities, however in some cases, the Quantity Surveyors' overall knowledge of the industry is often required.

Disputes in the industry can also differ greatly from a minor disagreement between a sub-contractor and contractor on a small domestic project to a major disagreement on a large commercial, residential, industrial or civil project. Once disputing parties see the need to seek advice from an independent third party the dispute has reached a stage where it obviously could not be resolved without outside assistance. The engagement of a Quantity Surveyor as the mediator can prove to be a cost and time effective method of reaching a resolution.

A requirement for the services of outside professionals generally arises on projects where there is minimal professional specialist consultant involvement or where properly prepared construction documentation was not developed. On projects where there has been an effort to engage suitably qualified professionals or consultants and comprehensive documentation has been provided the possibility of a dispute is reduced, and if a dispute does occur, it can be generally managed internally without the need for outside independent assistance.

As mentioned, engaging the services of a Quantity Surveyor is generally due to a dispute over cost and/or quantities. Disputes of a contractual nature are usually dealt with by experts in this field. Subject to the level of documentation available disputes in regard to cost and quantities are relatively straight forward to resolve whilst contractual disputes can be subject to either party's interpretation of the issue.

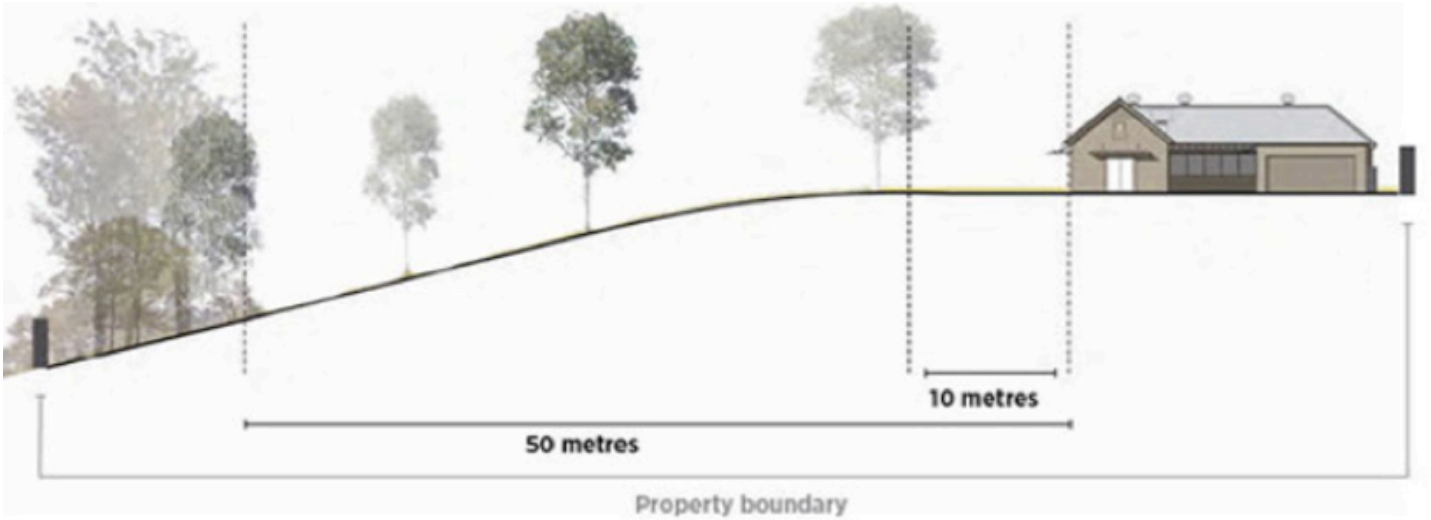
The need to engage the services of a Quantity Surveyor as an independent mediator is usually an indication that a project has been poorly managed and documented, however, the provision of a Quantity Surveyor's services can prove to be a satisfactory method of reaching a resolution.

David Noble
Director

BUSHFIRE PLANNING IN NSW

Spring is usually associated with the onset of the Australian bushfire season which has prompted DFP to examine the recent amendments to bushfire planning in NSW that affect existing and future development.

planning consultants



Source: NSW Rural Fire Service

Beyond the haze of legislation that is set to govern bushfire planning this season are proposed amendments that could take the heat out of understanding the applicable planning controls that apply to development within certain local government areas in NSW.

In May 2014, the process for pursuing subdivision development was streamlined as bush fire planning regulations were changed to enable the bush fire risk to be assessed upfront at the subdivision stage without the need for landowners and applicants to undertake another assessment of bush fire risk at the development application (DA) stage. In addition, the NSW Rural Fire Service (RFS) is able to update bush fire prone land maps more frequently which will hopefully promote greater accuracy.

On 1 August 2014, the Rural Fires Amendment (Vegetation Clearing) Act 2014 commenced which amends the Rural Fires Act 1997 and the National Parks and Wildlife Act 1974 to allow trees and vegetation that act as fuel for bushfires to be cleared from the external wall of the following types of development which contain a habitable room as defined within the Standard Instrument (Local Environmental Plans) Order 2006:

- Residential accommodation (including dwelling houses, seniors housing, etc.);
- Tourist and visitor accommodation;
- Caravans in caravan parks;
- Manufactured homes in manufactured home estates;
- Childcare centres;
- Schools; or
- Hospitals.

However, the building needs to benefit from a development consent, or other lawful authority under the Environmental Planning and Assessment Act 1979 and prescribed criteria needs to be satisfied, including the need to carry out the works in accordance with a Vegetation Clearing Code of Practice.

Not all sites will benefit from these (and other) changes to bushfire planning controls and it is important to remember that prescribed criteria and associated conditions apply.

Please contact DFP if you require town planning advice regarding bushfire planning controls for your next project.

John McFadden
Partner

GOOD DESIGN REQUIRES GOOD INVESTIGATION

Consultant Design Teams have a very important charter when commissioned for the design and documentation of a project. That is, the provision of documentation that is complete, accurate, and coordinated and has considered at least the following aspects:

- Requirements of the Client (Client Brief)
- Statutory obligations of the Building Code of Australia (BCA)
- Industry standards and guidelines
- Site conditions and constraints

It is often the case that design and documentation of a project will require information on the site conditions and constraints in connection with the existing building or facility to enable the consultant team to produce an informed design. Unfortunately, it is equally often the case that information on the existing building or facility is not available due to reasons such as age of the building and/or no formal records having been kept from previous building projects. This will typically lead to assumptions or qualifications being made by the consultant team in connection with the design. Such assumptions or qualifications invariably lead to additional variation work for the Contractor once it is engaged to perform the works.

To assist with combatting the incidence of such variations, the EPM Services Brief issued to Consultants requires the Consultant to specify additional investigations/testing that will be required to enable a design that has properly considered the existing site conditions and constraints. A well considered approach to these investigations/testing will allow the Client to make decisions about assigning budget to the investigations and ultimately provide the Client with a more informed design. This will reduce the likelihood of variations from the Contractor once construction has commenced.

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